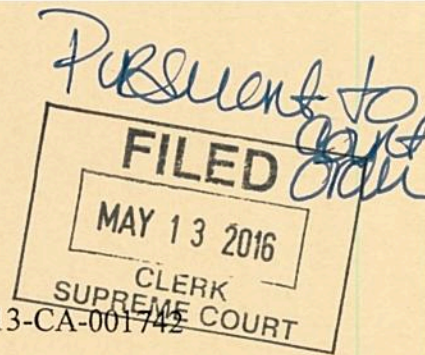


SUPREME COURT OF KENTUCKY
2015-SC-000461-DG



COURT OF APPEALS CASE NOS. 2013-CA-001695 and 2013-CA-001742

On Appeal from Franklin Circuit Court
Civil Action No. 11-CI-01613

LOUISVILLE GAS AND ELECTRIC COMPANY

APPELLANT

v.

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, VALLEY WATCH,
SAVE THE VALLEY, AND COMMONWEALTH
OF KENTUCKY ENERGY AND ENVIRONMENT CABINET

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CERTIFICATE OF SERVICE

It is hereby certified that pursuant to CR 76.12(5) that a true copy of this Amicus Brief for Kentucky Chamber of Commerce was served by First Class U.S. Mail, postage prepaid this 5th day of April, 2016, to John C. Bender, R. Clay Larkin, Dinsmore & Shohl LLP, 250 W. Main St., Suite 1400, Lexington, KY 40507; Sheryl G. Snyder, Jason P. Renzelmann, Frost Brown Todd LLC, 400 West Market St., 32nd Floor, Louisville, KY 40202, Counsel for Appellant; Joe F. Childers, Jr., Joe F. Childers & Associates, The Lexington Building, 201 West Short Street, Suite 300, Lexington, KY 40507; Nathaniel Shoaff, Andrea Issod, Sierra Club, 85 Second Street, Second Floor, San Francisco, CA 94105; Christopher R. Fitzpatrick, Energy & Environment Cabinet, 2 Hudson Hollow, Frankfort, KY 40601, Counsel for Appellees; Sally Jump, Franklin Circuit Court Clerk, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; and Honorable Phillip Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair Street, Frankfort, KY 40601; Sam Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

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INTEREST OF AMICUS CURIAE

The Kentucky Chamber of Commerce (“Kentucky Chamber”) is a business trade organization located in Frankfort, Kentucky. Founded more than 65 years ago, the Kentucky Chamber is the leading business association in the state, representing 3,800 member businesses – from family-owned shops to Fortune 500 companies – that employ over half of the Commonwealth’s workforce. Through its members, the Kentucky Chamber represents the interests of over 90,000 Kentucky businesses of all sizes and sectors, and in all regions of the Commonwealth. The Kentucky Chamber’s network, through a partnership with more than 80 local chambers, consists of 25,000 professionals.

The Kentucky Chamber’s mission is to serve as a catalyst, consensus-builder and advocate to unite business and advance Kentucky in business taxation, fiscal policy, workers’ compensation, health care, education reform and, important here, environmental and safety issues. The Kentucky Chamber supports a prosperous business climate and works to advance Kentucky through advocacy, information, program management and customer service in order to promote business retention and recruitment.

In its advocacy role, the Kentucky Chamber regularly participates as *amicus curiae* in federal and state courts. In this matter, the Kentucky Chamber, along with the U.S. Chamber of Commerce, participated as *amici curiae* before the Kentucky Court of Appeals, supporting the position taken below by the Kentucky Energy and Environment Cabinet (the Cabinet) and Permittee Louisville Gas and Electric Company (LG&E) that the Clean Water Act does not require the Cabinet to impose case-by-case “best professional judgment” limits in the Clean Water Act wastewater discharge permit for LG&E’s Trimble County Generation Station.

INTRODUCTION

The federal Clean Water Act plainly directs that ad-hoc, case-by-case, effluent discharge limits – which the Court of Appeals’ 2-1 Opinion¹ seeks to mandate – are not required for wastewater streams already subject to nationwide effluent limitation guidelines issued by the EPA (these guidelines are called “ELGs”). Federal courts agree, as do the courts of at least two bordering states (which compete with Kentucky for business location and retention). In fact, the Kentucky Chamber is unaware of *any* authority adopting this unduly burdensome approach. The reasons for this are apparent, as the Opinion’s approach would: (1) impose an unreasonable burden on an already strapped state agency charged with administering the permitting process, (2) as occurred here, run the risk of burdening businesses with an inconsistent, case-by-case, regulatory approach, and (3) fail to adhere to the uniform national standards Congress sought to effectuate through its enactment of the Clean Water Act.

Appellant LG&E’s Opening Brief² explains why, as a matter of law, the Court of Appeals’ contrary construction of the Clean Water Act is improper and otherwise fails to properly give deference – as it must³ – to the Cabinet. The Kentucky Chamber does not

¹ Judge Maze dissented.

² See also, Cabinet’s Opening Brief in the related appeal styled, *Commonwealth of Kentucky, Energy and Environment Cabinet v. Kentucky Waterways Alliance, et al.*, Case No. 2015-SC-000462. Briefing in these related appeals has not been consolidated. Although the Kentucky Chamber also fully supports the aligned interest and position of the Cabinet in its related appeal, in the interest of simplicity, leave to participate as *amicus curiae* has been sought only in this appeal.

³ See, e.g., *Board of Trustees of Judicial Form Retirement System v. Attorney General of Com.*, 132 S.W.3d 770, 787 (Ky. 2003); *Hagan v. Farris*, 807 S.W.2d 490 (Ky. 1991) (agency interpretation of its own regulations is entitled to substantial deference, and courts usually conform to agency’s construction when agency was responsible for promulgating regulation). Accord, *Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 843-45 (1984). Here, the courts below each impermissibly substituted their interpretation of the controlling statute and regulations for that of the Cabinet. See, e.g., *Reeves v. Jefferson County*, 245 S.W.2d 606, 610 (Ky. 1951) (“The court has nothing to do with the expediency of the measures adopted by an administrative agency to which the formulation and execution of state policy has been [e]ntrusted, and must not substitute its judgment or notions of expediency and fairness or wisdom for those which have guided such agency...” (citation omitted)).

repeat these numerous arguments here. Rather, this brief emphasizes and provides further explanation to the Court regarding the serious, and wide-reaching, policy implications should this Court allow the Court of Appeals' Opinion to stand.

Although the Opinion purports to be limited to the Cabinet's permit for the discharge of certain pollutants from LG&E's Trimble County coal-fired electrical generation facility, countless other Kentucky businesses – in a myriad of industries – are currently authorized to operate under Clean Water Act wastewater discharge permits (here, known as “KPDES permits”). Further, many businesses considering whether to locate in Kentucky must first obtain a KPDES permit in order to conduct business in the Commonwealth. The fundamental changes to the KPDES permit program which the Opinion mandates would profoundly impact the cost of doing business in Kentucky. Current and future Kentucky businesses (and all Kentuckians seeking the jobs created by a healthy business climate) have a strong interest in the consistent, efficient, and predictable implementation of the law, and in the integrity of the KPDES permit process.

Yet, if the Opinion stands, the process to obtain a discharge permit will be fundamentally transformed. Thousands of existing KPDES permits predicated on other nationwide ELGs will be open to challenge. The functionality of the entire KPDES permit process will be placed at risk from the severe delays certain to occur as the already severely strapped Cabinet attempts to perform judicially mandated, case-by-case reviews for new or modified discharge permits. Delays aside, the process of setting ad-hoc, permit-by-permit, limits for every industry category previously addressed by nationwide ELGs will inevitably diminish regulatory consistency, efficiency, and predictability. And, Kentucky will be at a huge disadvantage when competing for business, for no other

state has imposed the severe burden the Opinion places on regulated Kentucky businesses and our already lean Cabinet. In short, the Opinion, if allowed to stand, will hurt existing Kentucky businesses, and serve to dissuade those businesses Kentucky seeks to attract.

FACTUAL AND LEGAL BACKGROUND

A. Lower Courts Overturned The Clean Water Act Discharge Permit Issued by The Cabinet.

In this case, Appellees Kentucky Waterways Alliance, Sierra Club, Valley Watch, and Save the Valley administratively challenged the KPDES permit issued to LG&E for its Trimble Generating Station, arguing that because the ELGs applicable to certain waste streams from the Station did not prescribe specific numeric limits on certain pollutants, the Cabinet was required to instead impose additional case-by-case “best professional judgment” (BPJ) technology-based effluent limitations for those pollutants. The Cabinet upheld the Permit, concluding that it was not required to impose additional ad-hoc limits under a BPJ analysis because the wastewaters at issue were already subject to existing nationwide ELGs. Rejecting the Cabinet’s considered interpretation of the governing statutes and regulations, and substituting its own, the Franklin Circuit Court reversed and, in a 2-1 Opinion, the Court of Appeals affirmed.

B. The Federal Clean Water Act Establishes A Process For Regulating Pollutant Discharges Through Issuance Of Discharge Permits, And Grants Authority To Kentucky And Other States To Administer That Process.

The federal Clean Water Act, 33 U.S.C. §§1251 to 1387, regulates pollutant discharges into U.S. waterways through a National Pollutant Discharge Elimination System (NPDES) permit program. Exercising powers delegated to it under the Clean Water Act, the Cabinet stands in the shoes of the U.S. Environmental Protection Agency (EPA) and administers Kentucky’s NPDES permit program (called the KPDES program)

pursuant to federal law, as well as Kentucky statutes and implementing regulations.⁴ EPA retains oversight of the program. Kentucky must submit proposed KPDES permits to EPA for review, and EPA may object to any permit it finds inconsistent with the Clean Water Act.⁵ Significantly, the EPA did not take issue with the Cabinet's permit for LG&E in this case.⁶

Discharging any pollutant is unlawful, unless the discharger is in possession of, and in compliance with, an NPDES (or, in Kentucky, a KPDES) permit.⁷ These permits impose two types of limits on the pollutants in a given wastewater stream, one of which – and that at issue here – is a so-called “technology-based effluent limitation,” which requires a minimum level of effluent quality attainable using demonstrated pollutant reduction technologies. *See*, 40 CFR §125.3 (requiring permitting authority to develop such limitations consistent with Clean Water Act § 301(b))⁸.

Central to technology-based effluent limitations are EPA's nationwide Effluent Limitation Guidelines (ELGs). Congress saw the creation of a single national technology-based pollution control requirement for each industrial category as a means to uniformly address technology-based limits, thus reducing the potential creation of

⁴ *Natural Res. Defense Council v. EPA*, 859 F.2d 156, 183 (D.C. Cir. 1988).

⁵ 40 C.F.R. § 123.44. *See also* *Natural Res. Defense Council v. EPA*, 859 F.2d at 183-88.

⁶ The General Assembly has authorized the Cabinet to issue Clean Water Act KPDES permits. KRS 224.16-050. That statute directs that Kentucky permits may contain limits that are no more stringent than a limit that would have been applicable under federal regulation. KRS 224.16-050(4) (“The cabinet shall not impose under any permit issued pursuant to this section any effluent limitation, monitoring requirement, or other condition which is more stringent than the effluent limitation, monitoring requirement, or other condition which would have been applicable under federal regulation if the permit were issued by the federal government.”)

⁷ 33 U.S.C. § 1311; *see also* *Natural Res. Defense Council v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).

⁸ Technology-based effluent limitations are developed independent of the potential impact to the receiving water, which is addressed separately through water quality standards and water quality-based effluent limitations. *Natural Res. Defense Council*, 822 F.2d at 123. *See also* EPA, NPDES Permit Writers Manual, Sept. 2010 (“2010 NPDES Permit Writers Manual”), at Chapter 5 (available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf) (last visited April 25, 2016) and Appellant's Opening Brief, at pp. 2-3.

pollution havens.⁹ Once EPA has published a nationwide ELG for an industrial category, NPDES permits within that category *must* reflect the specified ELG numeric limitations.¹⁰ EPA further periodically reviews these ELGs, revising them as needed. 33 U.S.C. § 1314(m); 33 U.S.C. § 1311(d). KPDES permits – including that at issue here – must be renewed at least every five years to ensure that they timely incorporate the most up-to-date nationwide ELGs. 33 U.S.C. § 1342(a)(3), (b)(1)(A); *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928 n.3 (5th Cir. 1998).

Only in the absence of EPA’s promulgation of nationwide ELGs for an industrial category may permits be issued to specific facilities on an ad-hoc, case-by-case basis upon “such conditions as the permitting authority determines are necessary to carry out the” Clean Water Act.¹¹ These technology-based effluent limits are prescribed based on the permitting authority’s case-by-case “best professional judgment” rather than on a nationwide ELG (these are so-called “BPJ limits”).

Nationwide ELGs do not contain numeric effluent limits for every pollutant in a given waste stream. That is because the EPA has determined it “*impossible* to identify and rationally limit every chemical or compound present in a discharge of pollutants,” as any discharge may contain “hundreds or thousands” of chemical compounds.¹² Instead, EPA focuses on the primary pollutants in a waste stream or prescribes limits for “indicator” pollutants that will serve to also reduce other pollutants.¹³ In determining whether to set a limit for a given pollutant, EPA also “considers whether a pollutant is

⁹ 2010 NPDES Permit Writers Manual, at p. 5-14.

¹⁰ 33 U.S.C. § 1342(a), (b) and (o)(3). A nationwide ELG may impose differing guidelines, standards and level of control for new versus existing sources within the given industrial category, and also may differ depending upon whether the pollutant addressed is conventional, unconventional, or toxic.

¹¹ 33 U.S.C. § 1342(a)(1).

¹² *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 287-88 (6th Cir. 2015) (quoting *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, at *9 (EPA May 15, 1998)).

¹³ *Natural Res. Defense Council v. EPA*, 822 F.2d at 125; 2010 NPDES Permit Writers Manual, at p. 5-18.

present in the process wastewater at treatable concentrations and whether the model technology for effluent guidelines effectively treats the pollutant.”¹⁴ The process by which nationwide ELGs are established for a specific industrial sector involves an extremely time-consuming, in-depth engineering and economic analysis of that sector. Indeed, as detailed at pages 6-7 of Appellant’s Opening Brief, the effort to finalize the most recent 2015 nationwide ELGs for the steam electric sector (including coal-fired electrical generation facilities) spanned a staggering *ten* years. The difficulty of this endeavor – by an agency possessing far greater resources than does the Cabinet – undermines the ad-hoc regulatory approach the Opinion mandates.

Within this regulatory framework under the Clean Water Act and its implementing regulations, the Cabinet has not required the development and imposition of additional KPDES BPJ limits for pollutants specifically considered in the development of an applicable nationwide ELG (even if the ELG ultimately did not set limitations for such pollutants). This interpretation – which the lower courts impermissibly rejected in favor of their own alternative interpretation – is consistent with the express statutory language of the Clean Water Act, implementing regulations, case law precedent, and long-standing primary EPA guidance on NPDES permitting issues. Important to the Kentucky Chamber, this interpretation also promotes national uniformity, predictability and an even-playing field with regard to technology-based effluent limitations.

ARGUMENT

Requiring the development and issuance of ad-hoc, site-specific, case-by-case BPJ effluent limits for a waste stream already subject to a nationwide ELG is at odds with the express language of the Clean Water Act and established case law, as well as the

¹⁴ 2010 NPDES Permit Writers Manual, at p. 5-18.

Cabinet's reasonable interpretation (to the extent there is ambiguity) of the same. Further, the Opinion runs counter to, and directly disregards, the Clean Water Act's clear legislative goal of promoting national uniformity for technology-based effluent limitations. The Opinion thus imposes serious, and wide-reaching, adverse ramifications for Kentucky businesses and employees.

A. The Opinion's Construction Of The Clean Water Act Undermines The Clean Water Act's Primary Goal Of Establishing National Uniformity For Technology-Based Limits.

Congress intended that ELGs promulgated by the EPA under the Clean Water Act would minimize state-by-state inconsistencies and forum shopping by industrial dischargers, thus fulfilling its primary goal of establishing *uniform* national standards. *Natural Res. Defense Council v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (the "primary purpose of the effluent limitations and guidelines was to provide uniformity"). The Clean Water Act's legislative history further reflects the critical importance Congress placed on achieving uniformity:

The effluent limitation guidelines . . . were intended to safeguard against industrial pressures by establishing a uniform "minimal level of control imposed on all sources within a category or class." Senator Muskie emphasized the function of the guidelines in promoting uniformity. He stated that "the Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." . . . Once an effluent limitation is established, [] the state director and [EPA] are required to apply the specified, uniform effluent limitations, modified only as necessary to take account of fundamentally different factors pertaining to particular

point sources within a given class or category. Any variation in the uniform limitations adopted for specific dischargers must be approved by the Administrator.

Natural Res. Defense Council v. Train, 510 F.2d 692, 709-10 (D.C. Cir. 1974).¹⁵

The EPA and Cabinet have interpreted the statute and regulations to foster this goal, which courts have likewise endorsed. And the EPA's NPDES Permit Writers Manual – the primary interpretive document provided to all state permitting authorities to aid their administration of the NPDES permit system – provides that case-by-case BPJ limits for pollutants in an industry discharge subject to a nationwide ELG are appropriate only if “**not considered** by EPA when the Agency developed the effluent guidelines.”¹⁶

The Opinion's contrary interpretation of the Clean Water Act's technology-based effluent limitation framework flies in the face of this core tenet, threatening to create the very state-by-state patchwork of uneven and inconsistent regulation that Congress sought to eliminate through its enactment of the Clean Water Act. Judge Maze's dissent acknowledged this concern, noting that requiring the Cabinet to conduct a case-by-case BPJ analysis to determine technology based effluent limitations – for pollutants that EPA had already “clearly evaluated” and “considered” when developing the applicable steam electric national ELG – “is in contravention” of the “Clean Water Act's clear goal of national uniformity....”¹⁷ As set forth below, Kentucky would pay a high price by pursuing such an ad hoc, judicially mandated, regulatory approach which directly contravenes the current, nationally uniform, ELGs.

¹⁵ Citing U.S. Code Cong. & Ad. News 3668, *reprinted in* Environmental Policy Division of the Congressional Reference Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (Senate Public Works Comm. Print 1973).

¹⁶ 2010 NPDES Permit Writers Manual, at pp. 5-18, 5-46 (Emphasis added).

¹⁷ Court of Appeals Opinion, slip op. at p. 20.

B. The Opinion's Construction Of The Clean Water Act Would Over-Burden The Cabinet's KPDES Permit Process, Calling Into Question The Validity Of All KPDES Permits Incorporating Nationwide ELGs.

Nationwide ELGs are not unique to the steam electric generating sector. To date, at Congress' direction, EPA has promulgated nationwide ELGs for more than 50 industrial categories, including landfills, grain mills, cement manufacturing, petroleum refining, coal mining and metal finishing.¹⁸ Countless Kentucky manufacturing and other industrial facilities operate under KPDES permits setting limitations and conditions premised on these nationwide ELGs.

Like the nationwide ELG at issue here, none of the other nationwide ELGs prescribe numeric limits for every pollutant in the covered waste stream. As already noted, EPA determined it “*impossible* to identify and rationally limit every chemical or compound present in a discharge of pollutants.” *Supra*, pp. 6-7. For example, even EPA's most recent 2015 revision of the steam electric nationwide ELG does not establish numeric limits for every pollutant known to be present in the covered wastewater stream. In determining whether to set a limit for a given pollutant, EPA considers, among other things, “whether a pollutant is present in the process wastewater at treatable concentrations and whether the model technology for effluent guidelines effectively treats the pollutant.” That is precisely the reason the EPA cited in its 1982 steam electric category ELG for not setting limits on the pollutants at issue here. Appellant's Opening Brief, at pp. 6-8.

The Opinion, however, holds that even where EPA determines that the appropriate treatment technology it selects after years of study is not appropriate for

¹⁸ A complete list can be found at <https://www.epa.gov/eg/industrial-effluent-guidelines> (last visited April 25, 2016).

treating a particular pollutant, the Cabinet nonetheless must somehow go beyond EPA's analysis. Indeed, the Opinion would judicially mandate that the Cabinet undertake the seemingly insurmountable task of performing its own BPJ analysis of treatment technologies to establish case-by-case numeric technology-based limits for each pollutant, doing exactly what EPA – despite years of study and expenditure of enormous resources – deemed impossible or inappropriate.

The Kentucky Chamber respectfully submits that, when full scale impacts are considered, it is clear the KPDES permit program cannot function under the Opinion's paradigm. First, this obligation would impose an enormous undertaking on an already lean Cabinet to study and prescribe case-by-case technology-based limits for every pollutant EPA chose not to regulate in a nationwide ELG, each and every time a permit in a covered sector is issued or renewed. The Cabinet's Division of Water already processes a staggering average of 2,640 permit or other approval applications annually.¹⁹ Like all state government agencies, the Cabinet continues to face serious budget constraints, meaning this new, monumental task will need to be performed with even fewer resources.²⁰ Undoubtedly, unprecedented delays to an already lengthy permitting process would result, all to the detriment of KPDES permit applicants and the Commonwealth's business community.²¹

¹⁹ "Kentucky Division of Water FY 2015 Annual Report." Available at <http://water.ky.gov/pages/annualreports.aspx> (last visited April 25, 2016).

²⁰ Under the 2016-2018 Budget Bill (House Bill 303) passed by the General Assembly on April 15, 2016, in general, the Cabinet's spending would be reduced by 9 percent over the next two fiscal years. As of the date this Brief was filed, House Bill 303 had not yet been signed or otherwise acted upon by Governor Bevin. However, these cuts are consistent with his proposal to the General Assembly. See <http://www.lrc.ky.gov/record/16RS/HB303.htm> (last visited April 25, 2016) for the complete text and history of House Bill 303.

²¹ Although regulatory timeframes for review are not always adhered to, Cabinet regulations provide that it issue a final decision on a KPDES permit application within 180 calendar days after receiving an

Second, this framework introduces an entirely new level of regulatory uncertainty for our business community. Since BPJ limits are by definition case-by-case, they deprive Kentucky's regulated businesses of the fundamental tenet of regulatory consistency. Businesses would face an impossible burden in predicting and planning for effluent limitations, since essentially every permit renewal would require a new BPJ analysis and the potential imposition of new and different technology-based limits. EPA acknowledged this in the preamble to the 2015 nationwide ELGs for the steam generating industry category. 80 Fed. Reg. 67838, 67,852 (Nov. 3, 2015) ("BPJ permitting . . . would . . . unnecessarily burden the regulated industry because of associated delays and uncertainty with respect to permits.") Businesses would bear this uncertainty not just for new permits, but for every permit that they sought to renew going forward. This construction presents such an enormous departure from current practice, that the Kentucky Chamber submits that it would cast a cloud of doubt on any currently effective KPDES permit relying on a nationwide ELG. This Court should not countenance a judicially imposed mandate which so clearly departs from the plain language of the Clean Water Act, case law, and the Cabinet's longstanding reasonable interpretation of applicable regulations. *Accord, Natural Res. and Environmental Protect. Cabinet v. Whitley Devel. Corp.*, 940 S.W.2d 904, 908 (Ky. App. 1997) (affirming Cabinet's order regarding mine permits, court noted that the Cabinet's "interpretation is consistent with both the federal court interpretations of the applicable federal statutes, and with the applicable federal and state regulations") (citation omitted).

administratively complete permit application. 401 KAR 5:300. No industry may commence a covered discharge of pollutants until issuance of the KPDES permit. 401 KAR 5:055.

C. The Opinion's Construction Of The Clean Water Act Sets Kentucky Apart, Placing It At A Disadvantage When Compared With Other States.

The Opinion would also serve to promote the very problems of forum shopping and regulatory unpredictability that the nationwide ELGs were intended to prevent. States like Kentucky that imposed stricter BPJ limits would be punished for their efforts by being disadvantaged in attracting or retaining business.

In this context, it is noteworthy that two of Kentucky's neighboring states – Illinois and Tennessee – have rejected the Opinion's analysis and held no supplemental BPJ technology-based effluent limits are required when a national ELG is in place, even if the ELG does not regulate all known pollutants in a waste stream. Thus, two of Kentucky's nearest competitors offer businesses a more uniform, more predictable regulatory framework.

First, the Illinois Court of Appeals *expressly rejected* the Opinion's reasoning here, holding that no supplemental BPJ limits for mercury or other pollutants in a power plant's scrubber wastewaters were required in a permit issued prior to the most recent ELG revision, because the 1982 ELG applied to those discharges. *Natural Res. Defense Council v. Pollution Control Bd.*, 37 N.E.3d 407, 415 (Ill. App. 2015). The court explained that "contrary to the finding in *Louisville Gas & Electric Co. v. Kentucky Waterways Alliance*....[,] [b]ecause the Havana facility's scrubber/ACI waste stream was subject to the 1982 ELG, the Board did not err in finding the IEPA was not required to adopt [technology-based limits] on a case-by-case basis." *Id.*

Likewise, the Tennessee Chancery Court held that supplemental BPJ limits for scrubber wastewaters were not required to be included in a 2010 power plant permit, explaining that "EPA's 1982 ELGs at 40 C.F.R. Part 423 govern toxic and

nonconventional pollutants, including metals such as arsenic, mercury, and selenium, because the Preamble to those ELGs demonstrates that EPA recognized the presence of those pollutants, that power was given to the EPA Administrator to characterize those pollutants, and that the Administrator did so and decided not to set national numeric limitations for those particular pollutants.” *Tenn. Clean Water Network v. Tenn. Bd. of Water Quality, Oil & Gas*, No. 13-1742-I, at pp. 2-3 (Tenn. Chanc. Ct. Feb. 25, 2015).²²

The Opinion’s contrary holding, if allowed to stand, would mean that state lines – and not industry sector or waste stream – will drive permit decisions. This is inefficient, and ineffective, and not what Congress intended. It is precisely the kind of interstate regulatory competition that Congress sought to eliminate through promulgation of nationwide ELGs, thus effectuating the Clean Water Act’s goal of national uniformity for technology-based effluent limitations. The conflict between the Opinion and this tenet of the Clean Water Act should not be upheld.

CONCLUSION

Under the law as it stood until the below court decisions, it was proper for the Cabinet to not impose additional case-by-case limits on wastewaters already subject to effluent limits under a Clean Water Act nationwide ELG. The Opinion completely reverses that longstanding approach, substituting instead a judicially mandated ad-hoc, case-by-case analysis that no other federal or state authority has seen fit to adopt.

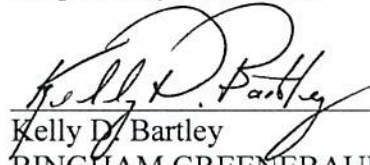
Affirming the decision below will cause serious economic repercussions in the Commonwealth. The Clean Water Act mandates nationwide technology-based ELGs to ensure national uniformity, efficiency, and effectiveness. But the Opinion would set

²² Please note that this is an unpublished decision and thus normally would be attached as provided in CR 76.28(4). However, due to the prohibition on attaching appendices to amicus briefs (CR 76.12(7)), the Kentucky Chamber refers the court to Appendix N of Appellant’s Opening Brief for this decision.

Kentucky apart from every other state, so that only in Kentucky would the permit authority be required to supplant nationwide ELGs for a waste stream with case-by-case analyses to derive limits for additional pollutants in that waste stream.

Regulatory consistency and the relative balance of anti-competitive requirements in any given state are key factors in every company's investment, growth, and employment calculus.²³ The Opinion denies the Commonwealth's manufacturers and industries this consistency and the level playing field that the Clean Water Act was intended to provide. The Kentucky Chamber respectfully requests that this Court reverse the Opinion and reinstate the Cabinet's Final Order upholding the KPDES permit at issue.

Respectfully submitted,



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²³ See generally, "The Impact of Regulation and Litigation on Small Business and Entrepreneurship," Rand Institute for Civil Justice, Working Paper (Feb. 2006); http://www.rand.org/content/dam/rand/pubs/working_papers/2006/RAND_WR317.pdf (last visited April 25, 2016).